

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 05-cv-329-GKF(PJC)
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE OF OKLAHOMA'S MOTION IN LIMINE TO PRECLUDE
ARGUMENT, QUESTIONING OR EVIDENCE THAT ENTRY OF THE REQUESTED
INJUNCTION UNDER RCRA WOULD INTERFERE OR CONFLICT
WITH ONE OR MORE STATE REGULATORY PROGRAMS**

COMES NOW Plaintiff, the State of Oklahoma ("the State"), and respectfully requests that this Court issue an order precluding argument, questioning or evidence that entry of the requested injunction under RCRA would interfere or conflict with one or more state regulatory programs. In support of its Motion, the State states:

1. In filings in this action it has been suggested or implied that entry of the requested injunction under RCRA would interfere or conflict with one or more state regulatory programs. *See, e.g.*, DKT #1543.

2. Such argument, questioning or evidence would be irrelevant as a matter of law, and therefore should be excluded. *See* Fed. R. Evid. 402 ("Evidence which is not relevant is not admissible").

3. The law is well-established that an imminent and substantial endangerment claim under 42 U.S.C. § 6972(a)(1)(B) of RCRA "is not superseded by a state program." *See Eckardt v. Gold Cross Services, Inc.*, 2006 WL 2545918, *2 (D. Utah Aug. 31, 2006); *see also Drague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 557 (1992)

("a subsection B suit does not depend on any specific subchapter III provision, nor is it superseded by a state program"); *T&B Limited, Inc. v. City of Chicago*, 369 F. Supp. 2d 989, 993 (N.D. Ill. 2005) ("Section 6972(a)(1)(B), as opposed to § 6972(a)(1)(A), is not superseded by state environmental laws"); *Clorox v. Chromium Corp.*, 158 F.R.D. 120, 124 (N.D. Ill. 1994) ("courts hold that state regulations do not supersede § 6972(a)(1)(B)"); *Stewart-Sterling One, LLC v. Tricon Global Restaurants, Inc.*, 2002 WL 1837844, *2 (E.D. La. Aug. 9, 2002) ("Every court that has addressed the effect of state-run hazardous waste programs on imminent hazard suits under subsection (a)(1)(B) has concluded that such suits are not superseded by [the] state program") (quotations omitted). Accordingly, argument, questioning or evidence that the requested injunction under RCRA would interfere or conflict with one or more state regulatory programs is simply irrelevant.

4. Further underscoring this point is the fact that the language of 42 U.S.C. § 6972(a)(1)(B) "is intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate *any risk* posed by toxic wastes." *See Burlington Northern and Santa Fe Railway Co. v. Grant*, 505 F.3d 1013, 1020 (10th Cir. 2007) (citations and quotations omitted) (emphasis retained). Thus, assuming *arguendo* that if, contrary to 42 U.S.C. § 6972(a)(1)(B) of the federal RCRA statute, state regulatory law were in fact to authorize or permit persons to contribute to the handling, storage, treatment, transportation, or disposal of solid waste in such a manner that it may present an imminent and substantial endangerment to health or the environment, then in such instance, such state regulatory law would be pre-empted by the federal RCRA statute. *See, e.g., Emerson v. Kansas City Southern Railway Co.*, 503 F.3d 1126, 1128 (10th Cir. 2007) ("Because of the supremacy of federal law, state law that conflicts with federal law is without effect") (quotations and citations omitted); *cf.*

Blue Circle Cement, Inc. v. Board of County Commissioners of the County of Rogers, 27 F.3d 1499, 1504 (10th Cir. 1994) (" . . . there may very well be both express and implied preemption by RCRA of more permissive state and local regulations pertaining to hazardous wastes . . ."). Such state regulatory law -- be it a state agricultural regulation, a state solid waste program regulation, or the like -- would have to yield to RCRA, and RCRA would require that such conduct be enjoined.¹

WHEREFORE, in light of the foregoing, Defendants should be precluded from making argument, doing questioning or proffering evidence going to the proposition that entry of the requested injunction under RCRA would interfere or conflict with one or more state regulatory programs.

Respectfully Submitted,

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¹ The fact of the matter is that there is no such conflict between RCRA and Oklahoma law as Oklahoma law plainly prohibits the runoff of poultry waste and the resultant pollution of the IRW. *See, e.g.*, 2 Okla. Stat. § 10-9.7(B)(4)(a); 2 Okla. Stat. § 10-9.7(B)(4)(b); 2 Okla. Stat. § 10-9.7(C)(6)(c); 27A Okla. Stat. § 2-6-1-5(A); 2 Okla. Stat. § 2-18.1.

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CERTIFICATE OF SERVICE

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